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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 614

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

vs.

RICHARD S. PRATHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court:

Petitioners, Camerarts Publishing Co., Inc., Allied News Co., Inc., Frank Sorren, and Robert Sorren, respectfully pray that a writ of certiorari issues to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, granting a judgment to plaintiff in the aggregate amount of $43,000.00, plus costs, for copyright infringement.

This cause involves a 72 count complaint for copyright infringement involving 33 books published and distributed by the respective petitioners. In a bench trial the trial court awarded plaintiff a judgment of $21,000.00 and $3,000.00 attorneys fees against the publishers and $18,000.00 plus $1,000.00 in attorneys fees against the distributor of the same books. The judgment was affirmed by the Court of Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported and is reproduced as appendix "A" to this Petition. The opinion of the District Court is unreported and is reproduced as appendix "B" to this petition. The order denying plaintiff's petition for rehearing is not reported and is reproduced in appendix "C" to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 9, 1973. A Petition for Rehearing with a suggestion for rehearing *en banc* was filed on July 23, 1973, and denied on August 3, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED.

1. Whether damages may be awarded in separate judgments against a publisher and distributor of the same book where their actions resulted in one and only one act of infringement, if any.

2. Whether the copying of small and inconsequential amounts of material from one or two pages of a 150 page book is *de minimus*.

3. Whether attorney's fees may be awarded to a plaintiff against innocent infringers who have presented substantial legal defenses and have defended in good faith.

STATEMENT OF THE CASE.

In August, 1968, plaintiff filed a four count complaint for copyright infringement, alleging that defendants had published 3 books authored by an independent contractor, Jerry M. Goff, Jr., which contained material allegedly infringing three books written by him. After the commencement of discovery during which defendants produced other books authored by Goff, Plaintiff amended his complaint to include 72 counts complaining that defendants had published and distributed 33 books which had infringed 16 books written by him.

The Publisher, Camerarts, had ceased publishing all books in 1965. All of the books written by plaintiff which had allegedly been infringed were published in 1956 and

1957. Each of the books written by plaintiff contained approximately 150 pages, and each of defendants' books contained approximately 135 pages. In most instances, the alleged infringement consists of a sentence or less, usually being descriptive material or conversational. Plaintiff has alleged no appropriation of any of his plots, nor of the essence of his books.

Of the 72 counts in the amended complaint, 39 of them complain of material allegedly taken from four pages of plaintiff's books or less (but not complete pages, only portions):

Count	*Plaintiff Book*	*Portion Of Pages*
4	Strip for Murder	2
5	" " "	1
6	" " "	2
7	" " "	2
8	" " "	1
15	Kill the Clown	3
16	" " "	2
17	" " "	2
18	" " "	1
20	Bodies in Bedlam	3
21	" " "	2
22	" " "	3
23	" " "	3
27	Always Leave 'Em Dying	1
29	" " " "	3
30	" " " "	3
31	" " " "	2
32	" " " "	2

Count	*Plaintiff Book*	*Portion Of Pages*
34	Slab Happy	4
39	Dance with the Dead	2
41	Shell Scott's Seven Slaughters	1
44	" " " "	4
45	" " " "	2
46	" " " "	1
47	Have Gat-Will Travel	4
49	" " " "	3
51	Three's A Shroud	3
52	" " "	1
56	Dagger of Flesh	3
57	" " "	2
58	" " "	2
59	" " "	2
60	" " "	2
61	Lie Down Killer	3
66	Over Her Dear Body	4
67	" " " "	1
68	" " " "	2
71	The Scrambled Yeggs	1
72	" " "	1

All books published by Camerarts were purchased from free-lance writers, one of which was Goff, who warranted that all of his manuscripts were original and contained no infringing material. Defendants had no notice of the alleged infringement until the service of summons upon them in this matter. Plaintiff admitted that no attempt had been made to contact defendants prior to the filing of his suit.

Camerarts Publishing Company, Inc., and Allied News Co., Inc., are completely separate and distinct legal entities. Camerarts Publishing Co., Inc., publishes books and magazines. Allied distributes books and magazines of both Camerarts and others. Each book distributed by Allied was purchased from Camerarts for a specific amount with right of return. At no time, were the actions of Allied controlled in any manner by Camerarts.

The paper-back books involved remained on the market for a period of 90 days before being returned to the distributor, although the selling period decreased to approximately 30 days as time went on.

At no time did plaintiff allege that he had been injured in any way by the sale of defendants' books, and admitted that the sales of his books continued to increase during the time defendants' books were being sold. All of his books are still in print, and he has signed contracts selling some of his stories for movies and television.

After submission to the District Court on depositions, stipulated facts, exhibits and one-half days' testimony, the trial court held this matter under advisement for a considerable period of time, finally rendering judgment in favor of plaintiff and against defendants on all counts of the complaint except two, which he found were barred by the Statute of Limitations. No findings were made as to the individual books involved, the only finding on infringement being "the copying, where shown, consists of flagrant word for word verbatim copying, and is substantial both in volume and in significance of the portions taken." In regard to defendants' defense of *de minimus*, the District Court merely stated that "while in some

instances the plagiarism was limited, the general course was one of flagrant violation of Prather's copyright."

In overruling defendants' defense of the Statute of Limitations, the Court found that Allied was an agent of Camerarts in distributing the books, for the purpose of holding that the returns of these books were being received within the period of limitations. For purposes of awarding damages, the trial court held that Allied and Camerarts were separate entities and assessed damages separately. The damages, which ranged from $250.00 to $600.00 per count, were supported by no explanation as to the basis for the amounts awarded. Similarly, no explanation was given for the award of attorney's fees in the amount of $3,000.00 and $1,000.00 respectively; the award being justified only by the statement that "this appears to be an appropriate case for the award of substantial attorneys fee, particularly in view of the great volume of work devoted to successfully prosecuting this 72 count complaint."

The Court of Appeals failed to render a full opinion in this matter, instead handing down a two-page order affirming the judgment of the District Court. That opinion contains several severe misstatements of fact. It was concluded by the Court of Appeals that the books involved were shipped from the publisher to the distributor on a consignment basis, a position which was never raised at any time by any of the parties. The Court of Appeals simply failed to pass upon the contentions of defendants regarding the Statute of Limitations, *de minimus,* and the double recovery of profits, relying wholly upon the findings of the District Court with no discussion whatsoever.

REASONS FOR GRANTING THE WRIT.

I.

IT IS A VIOLATION OF DUE PROCESS FOR PLAINTIFF TO BE AWARDED DOUBLE DAMAGES AND CONTRARY TO THE RULINGS IN THE VARIOUS CIRCUITS.

Perhaps the most extraordinary element in this extraordinary case is the failure of both the District Court and the Court of Appeals to give any explication of the reasons for the conclusion reached in this case. The actual discussion and reasons for the judgment entered by the District Court encompasses no more than eight pages. The decision of the Court of Appeals affirming is merely two pages. This, in a case involving 72 counts, each alleging a separate purported copyright infringement, and in which defendants raised at least five substantial defenses. Yet, this case was decided in a most off-hand manner. There is no serious discussion in either opinion of the important legal issues involved in this cause. For this reason, as well as the importance of those issues, and the fact that this decision conflicts with the decisions of other Courts of Appeals, this Court should review this cause, which presents an opportunity to hand down comprehensive and definitive guidelines concerning certain important aspects of the law of Copyright, a field in which this Court has been relatively silent.

The most unsupportable portion of this case is that plaintiff has been awarded a double recovery to which he is clearly not entitled. Plaintiff admitted that he had

sustained no damage as a result of the publication and sale of defendants' books. In fact, he admitted that during the time these books were on sale, his own publications had increased in circulation. The District Court found that the "in lieu" measure of damages authorized by the Copyright Act should be applied, since "neither the extent of any of Plaintiff's injury nor the amount of Defendants' profits can be ascertained with any degree of reasonable certainty."

However, the District Court did not stop with awarding Plaintiff one amount of damages for each count, but awarded him one amount of damages against the distributor and one amount against the publisher, thereby impermissibly compounding the amount awarded. Absolutely no reason was advanced for this action, which was taken in the face of a specific finding by the District Court that the distributor, Allied, "acted only as agent for Camerarts", the publisher. The Court of Appeals stated specifically that it agreed with the District Court in the finding that the books had been shipped from the Publisher to the Distributor on a consignment basis. In upholding the damages awarded, the Court of Appeals merely stated that "We find nothing 'impermissible' about holding both consignor and consignee liable for copyright infringement."

Of course, this statement begs the question in issue. There is no doubt that the copyright law makes both publisher and distributor liable for infringement. However, no other case in the history of the Copyright law has allowed the award of separate in lieu damages against two entities within the same chain of distribution. Indeed, every other case has held exactly the opposite. The

most recent decision to consider this issue is *Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972), where the plaintiff had been paid a certain amount in settlement by two of the defendants in return for a covenant not to sue. After the matter had been tried as to other defendants, the Court of Appeals held that these settlement payments were required to be deducted from the award of damages, stating: "we hold that the copyright act allows only a single recovery for a single sale." This finding was based upon the premise that where all defendants are connected with the same infringement, they are jointly and severally liable and recovery from one reduces the liability of the others, regardless of whether it was so agreed at the time of settlement and regardless of whether the settling defendant is in fact liable to the copyright proprietor.

This holding was completely ignored by the Court of Appeals, which gave absolutely no reason for its contrary decision. It is clear that no adequate consideration was given to this issue. To allow this decision to stand without resolution of this issue will inevitably cause great confusion as to the permissible damages in copyright cases and be a violation of due process of law, as well.

Nor does the holding by the Second Circuit stand alone. It is supported by every other case on the subject which defendants have been able to find. In *Gross* v. *Van Dyk Gravure Co.*, 230 Fed. 412 (2d Cir. 1916), it was held that the manufacturer of a photograph, the printer and the distributor were all jointly liable for the plaintiff's damages. Similarly, in *Greenbie* v. *Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957), it was held that where a party causes or procures an independent contractor to print or copy

a work, that party will be *equally* liable with the independent contractor as a tort-feasor.

Similarly, in *H. M. Kolbe Co.* v. *Shaff*, 240 F. Supp. 588, 590 (S.D.N.Y. 1965), aff'd 352 F.2d 285, plaintiff commenced suit against a corporate officer after it had been unable to collect a prior judgment it had been awarded against the corporation. In allowing the cause to proceed, the Court held that "the fact that one joint tort feasor has been sued and a judgment rendered does not bar the suit against the remaining joint tort feasors *where the judgment is unsatisfied.*" Again, in *Detective Comics, Inc.* v. *Bruns Publications*, 28 F. Supp. 399, 401 (S.D.N.Y. 1939), the court held that distributors "will only be secondarily liable for such damages and profits in case the [publisher] cannot answer therefor. In such event, they will be jointly and severally liable therefor as joint and several infringers of the plaintiff's copyright."

Thus, it is clear that the decision in this case is contrary to every other decision which has ever been rendered in this issue. As a result, plaintiff, who has never claimed that he was injured in any way, shape or form whatsoever, has been awarded a windfall to which he is not entitled. This aberration should not be allowed to stand, where the result is to penalize unfairly an innocent infringer. The "in lieu" damages are to be used where actual damages to plaintiff and actual profits of the defendant are not ascertainable, but in the words of the statute itself, "shall not be regarded as a penalty." 17 U.S.C. §101(b). The statute and all the cases decided under it have been flagrantly disregarded in this case, such disregard as to amount to violation of due process.

II.

THIS CAUSE IS BARRED BY THE STATUTE OF LIMITATIONS AS INTERPRETED BY THE VARIOUS CIRCUITS.

The Copyright Act provides that all civil actions for alleged infringement shall be "commenced within three years after the claim accrued." 17 U.S.C. §115(b). This suit, originally consisting of a four-count complaint, was filed in August, 1968. On May 23, 1969, the amended complaint, consisting of 72 counts, was filed. The last of defendants' books was published in November, 1964. There is no question that virtually all of the sales of these books occurred more than three years prior to the institution of this action. The evidence is uncontradicted that the normal practice was to keep the books on sale for three months after publication. The actions of the publisher, and the cause of action insofar as it was concerned, accrued at the time of publication. Thus, as to the last book published by it, the statute of limitations barred any action on and after November, 1967, nine months prior to the institution of this suit, and 17 months prior to the filing of the Amended Complaint.

It was never seriously contended that the publisher committed an infringing act within three years prior to the filing of the Amended Complaint, or even within three years prior to the filing of the Complaint. Both the District Court and the Court of Appeals relied upon the actions of the distributor in holding the publisher liable, finding that the books involved had been conveyed from the publisher to the printer on a consignment basis, thereby making the publisher liable as the principal of the distributor. There is absolutely no support for this position. There were none of the usual incidents of a con-

signment. No such relationship existed. The evidence is uncontradicted that the printer had no control whatsoever over the distributor. It parted with title when the book was delivered to the distributor. The only relationship between the two after the original sale was that the distributor could return unsold copies to the publisher for credit on future purchases. This does not establish a consignment. As was said in *Maloney* v. *Stone*, 171 F. Supp. 29, 32 (D. Mass. 1959):

> "But in the case at bar, as in virtually all infringement cases, the nexus between the owner of the copyright and the printer of infringing copies arises when the infringements are produced. The moment Anderson printed he became liable to plaintiff. It was then he invaded plaintiff's rights. After Anderson delivered the copies to Stone and Hampden, Anderson did no more directly or indirectly, as principal or agent. To hold Anderson liable for what his independent customers do would be a socially preposterous and commercially disastrous doctrine."

Indeed, this is the position taken by this very Court in connection with an anti-trust matter in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 806 (1971):

> "In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, *the statute of limitations runs from the commission of the act.* [citing cases] . . . Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all

damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. *To recover those damages, he must sue within the requisite number of years from the accrual of the action.*" (emphasis added)

As discussed above, the Courts below found, for purposes of the statute of limitations, that the publisher and distributor were one and the same party, and for purposes of the awarding of damages they were separate and independent. Such a schizoid decision cannot be allowed to stand. It must be either one way or the other. Either they were the same party, and one award of damages may be made against both parties jointly; or they are separate parties, and the statute of limitations runs in favor of the publisher as to all counts and in favor of the distributor as to virtually all. In either event, plaintiff is entitled to one judgment, not the double recovery which he has been awarded.

III.

PLAINTIFF HAS FAILED TO PROVE SUBSTANTIAL INFRINGEMENT.

There is no dispute that defendants, if they are infringers, are wholly innocent and unknowing infringers. They purchased the manuscripts involved from a free-lance author, who warranted to them that the material contained therein was non-infringing. There was no way they could have known of the infringement. Not even plaintiff knew. After discovery, during which defendants supplied plaintiff with copies of all books published and distributed by them, the original four-count complaint grew to the present 72-count action. Apparently the magnitude of the complaint and the exhibits attached thereto overwhelmed the courts below, because it is patent that

no serious effort was made to analyze any of the alleged infringements.

"In order to sustain an action for infringement of a copyright, a substantial copy of the whole or a material part of the copyrighted material must be reproduced. *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 6 Cir., 1943, 135 F. 2d 73." *M. J. Golden & Co.* v. *Pittsburgh Brewing Co.*, 137 F. Supp. 455 (W.D. Pa. 1956). ". . . Plaintiff, to make out his case, must establish two separate facts: (a) that the alleged infringer copied from plaintiff's work, and (b), that, if copying is proved, it was so 'material' or 'substantial' as to constitute unlawful appropriation." *Heim* v. *Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946). See also *PIC Design Corporation* v. *Sterling Precision Corp.*, 231 F. Supp. 106 (S.D. N.Y. 1964); *MacDonald* v. *De Maurier*, 75 F. Supp. 655 (S.D. N.Y. 1948); *Solomon* v. *RKO Radio Pictures*, 44 F. Supp. 780 (S.D. N.Y. 1942); and *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 795 (S.D. N.Y. 1971).

What is substantial or material does not always deal with mere quantity, but must take into account the quality of what is appropriated. While no hard and fast rule may be paid down, the general guidelines in this area are well stated in Nimmer on Copyright, §143.12, pp. 629-30:

> "No easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity. . . . The question in each case is whether the similarity relates to matter which constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work. The quantitative relation of the similar material to the total material contained in

> plaintiff's work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important the trier of fact may properly find substantial similarity. In such circumstances the defendant may not claim immunity on the grounds the infringement 'is such a little one.' If, however, the similarity is only as to nonessential matters, then a finding of no substantial similarity should result."

Thus, it is the amount of plaintiff's work which has been taken which controls, not what that portion of the material taken bears to defendant's entire work. This is because the copyright laws bar only an appropriation of plaintiff's effort, and if the amount taken is insubstantial and immaterial, it makes absolutely no difference what defendant has done with it.

The question is how much of plaintiff's work has been copied and how important is that portion. "Both quantity and quality are to be considered." *Smith* v. *Little Brown & Co.*, 245 F. Supp. 451 (S.D. N.Y. 1965), *aff'd.* 360 F. 2d 928 (2d Cir. 1966). Mere similarity in some small respect is not sufficient. The biased view of the plaintiff, who will claim appropriations at the slightest similarity, is not controlling. Since it is the damage to the plaintiff in the eyes of his audience—the public—which is at the heart of the issue, it is the reaction of the public which is the ultimate test.

> ". . . on the issue of whether the copying went so far as to constitute improper appropriation, i.e., was 'substantial,' the test is 'whether an average lay observer would find a substantial similarity in the designs, recognizing the copy as an appropriation of the copyrighted work.'" *McGraw-Hill, Inc.* v. *Worth*

Publishers, Inc., 335 F. Supp. 415, 420 (S.D. N.Y. 1971).

Yet, both the District Court and the Court of Appeals failed to make any analysis whatsoever of the alleged infringing language set forth in the Amended Complaint and the exhibits thereto. The District Court stated, in conclusory and unsupported language only, that "the copying by Defendants from Prather's works was repetitious and flagrant." Indeed, in making this statement, the Court completely ignored the uncontested fact that the copying, if any, was done by the author of the manuscripts, not by defendants.

In response to defendants' vigorously presented defense that many of the counts did not in fact make out a case of infringement, the court merely stated that "while in some instances the plagiarism was limited, the general course was one of flagrant violation of Prather's copyright." The Court of Appeals merely adopted this language in its order affirming the decision, without reason or explication.

A comparison of the language alleged to have been infringed shows that many of the counts of the Amended Complaint are frivolous. For example, the following language is *the entire amount* allegedly copied from plaintiff's book, in support of Count 5 of the Complaint:

> ". . . lips clung to mine for a long time. . . . hands . . . against . . . back, fingers curling. . . . making small sounds in . . . throat. Then . . . move against. . . . lips traced . . . cheek and touched . . . each as I whispered to. . . ."

Plaintiff's book is 150 pages, and defendants' book is 130 pages. For this brief material, this deathless prose,

a fraction much less than 1%, more nearly 1% of 1%, in volume, inconsequential in quality, plaintiff claims, and the Court awarded plaintiff, $250.00 against each set of defendants individually.

An even more flagrant example of plaintiff's outrageous claims is found in Count 18 of the Amended Complaint, wherein the entire complaint is based upon the following part of a sentence of defendants' book "Eager Female": "When she walks across a room it's enough to make a eunuch cry,"; which is supposed to have infringed the following from plaintiff's book "Kill the Clown": "a kiss that could melt cheap fillings and make a eunuch's voice change overnight—". For this tiny fragment of a fragment plaintiff also was awarded $250.00 damages against each set of defendants.

A similar example is found in Count 27, where the language in defendants' book, "wrapped a huge Turkish bath towel about my dripping body" is supposed to have infringed plaintiff's language "so I wrapped a towel around my middle . . ." *This is the entire basis of Count 27 of the Amended Complaint.* It can only be described as preposterous.

Again, Count 67 is based entirely upon the following alleged copying. Plaintiff's language: "she made me feel so red-blooded that I was sure my white corpuscles had a pinkish tint to them." Defendants' language: "she ruined all the white corpuscles and made them bleed so all corpuscles were when you looked at her." Again, this is the entire basis of this count. This, too, is straining at a gnat, but it is wholly characteristic of plaintiff's claims.

And, again, Count 71. Plaintiff's language: "She didn't have on a brassiere. I wasn't guessing; there wasn't any doubt about it. No brassiere, just the stuffing. But what stuffing!" Defendants' language: "You don't see a sweater like hers every day and forget it. The sweater itself wasn't anything unusual, but the filling was fantastic." Again, the entire basis for which plaintiff was awarded $250.00 against each set of defendants, a total of $500.00.

Similarly, Count 72. Plaintiff's language: "when she opened the door . . . the piled black hair on the top of her head . . . dangling from the small, white lobes of her ears." Defendants' language: "when she opened the door . . . hair . . . on top of her head . . . dangled from her ears." And again, $250.00 to plaintiff for each set of defendants, publisher and distributor.

Both the District Court and the Court of Appeals failed to analyze this situation, or even recognize it, both ignoring in most instances the various counts of the Amended Complaint, instead lumping the various books together in a melange that is almost impossible to follow.

The purpose of the Copyright Law is to protect against substantial infringements and not to grant windfalls to a greedy author who has suffered no losses.

Immediately following is a table settting forth as to each count of the Amended Complaint, the number of pages of plaintiff's books allegedly infringed, and the number of pages of defendants' books allegedly containing infringing material. This analysis shows that most of the counts in the Amended Complaint are not actionable.

Count	(These do not include whole pages, but only portions thereof, sometimes lines) Pages of Plaintiff's Book Allegedly Infringed	Pages of Defendants' Book Allegedly Infringing
1	7	11
2	27	29
3	6	6
4	2	3
5	1	1
6	2	3
7	2	2
8	1	1
9	16	17
10	13	10
11	7	8
12	12	9
13	11	8
14	9	11
15	3	2
16	2	2
17	2	1
18	1	1
19	15	24
20	3	5
21	2	1
22	3	3
23	3	3
24	18	17
25	14	16
26	14	10
27	1	1
28	4	2
29	3	2
30	3	3
31	1	1
32	2	2
33	9	8
34	4	3
35	5	5
36	6	8

Count	(These do not include whole pages, but only portions thereof, sometimes lines) Pages of Plaintiff's Book Allegedly Infringed	Pages of Defendants' Book Allegedly Infringing
37	5	12
38	8	7
39	2	2
40	7	7
41	1	2
42	15	19
43	22	22
44	3	4
45	2	2
46	1	1
47	4	5
48	16	17
49	3	4
50	13	8
51	4	5
52	1	1
53	6	8
54	6	6
55	20	20
56	3	4
57	2	2
58	2	2
59	2	2
60	2	2
61	3	2
62	9	13
63	9	9
64	14	23
65	25	23
66	4	2
67	1	1
68	2	1
69	12	13
70	2	2
71	1	1
72	1	2

While these matters were called to the attention of both the District Court and the Court of Appeals, neither seemingly gave any serious attention to them. Instead, plaintiff was granted a windfall in the face of unbroken authority which would disallow such an extraordinary holding. Insofar as the 39 counts set forth in the table above is concerned, there must be a finding that there has been no infringement as a matter of law. The decision of the courts below in this matter are in direct conflict with the decision in *R.L. Polk & Co.* v. *Musser,* 105 F. Supp. 351 (E.D. Pa. 1952), *aff'd.,* 196 F. 2d 1020 (3d Cir. 1952), where the court said:

> ". . . the result is that no more than 225 names out of over 47,000, or a little less than one-half of 1% of the names in the defendants' book were copied. The balance unquestionably represents original work. . . . There certainly was nothing remotely resembling wholesale appropriation of the plaintiff's work and I think that what copying was done falls short of being substantial, as that term applies to copyright infringement."

The situation here is the same. The amount allegedly appropriated is, at the most 0.7% of the amount of plaintiff's work. If this is not *de minimus* then nothing ever could be. There has been no copying as to those 39 counts which would support an action for infringement. A reading of the opinions below show that neither court made any attempt to analyze fairly the alleged infringement, but rather assumed that plaintiff was entitled to relief as a result of the vast amount of infringement *claimed* by him. Defendants were entitled to a full and fair consideration of each count separately, particularly in light of the uncontested fact that they were innocent parties.

They were not given such fair consideration. Instead the District Court entered an award and opinion which was at odds with all settled authority in the field of copyright. The Court of Appeals merely affirmed this decicion without giving any real consideration to any of these important issues.

As was said in *Toulmin* v. *Rike-Kumler Co.*, 137 U.S. P.Q. 533 (S.D. Ohio 1962), *aff'd.* 316 F.2d 232 (6th Cir. 1963), the use of one sentence and a part of another represents neither a substantial nor a material part and "was insignificant in value and extent of the copyrighted material, did not in any way prejudice the sale, diminish the profits or supersede the objects of the original works, and was thus a 'fair use' thereof." Each count of the complaint should have been measured against this guideline. It is obvious that they were not. Allowing the decisions below to stand will serve to throw needless confusion into the field of copyright, and subject these defendants to unsupportable injustice.

IV.

PLAINTIFF WAS IMPROPERLY AWARDED ATTORNEY'S FEES CONTRARY TO HOLDINGS IN THE VARIOUS CIRCUITS.

To conclude the wholly erroneous and unjust decision against defendants, the District Court awarded attorneys to plaintiff of $3,000 against the publisher and $1,000 against the distributor. The only justification for this obviously unfair award was that "this appears to be an appropriate case for the award of substantial attorneys' fees, particularly in view of the great volume of work devoted to successfully prosecuting this 72-count com-

plaint." As indicated above, the finding that plaintiff had successfully prosecuted the complaint was wholly wrong.

Attorney's fees are not awarded as a matter of right. Such award must be based upon facts and reason. The cases are again consistent in this area. Attorneys fees are to be awarded to the prevailing party only when the losing party has acted in bad faith. *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F.2d 236 (9th Cir. 1966). They are to be awarded only where "equity considerations exist which call for the penalization of the losing party." *Cain* v. *Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942); *Morser* v. *Bengor Products Co.*, 238 F. Supp. 926, 929 (S.D.N.Y. 1968). Nor should innocent defendants be penalized where they have been victimized by a third party, as was the case here. *Screen Gems-Columbia Music, Inc.* v. *Mark-Fi Records Inc.*, 327 F. Supp. 788, 792 (S.D.N.Y. 1971).

Indeed, both courts below ignored the rule previously set down in the Seventh Circuit. Attorney's fees should not be awarded the prevailing party where the case has been hard fought and prosecuted in good faith. *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F. 2d 384 (7th Cir. 1967); *Official Aviation Guide, Co.* v. *American Aviation Associates*, 162 F.2d 541, 543 (7th Cir. 1947); *Eisenschiml* v. *Fawcett Publications*, 246 F.2d 598, 604 (7th Cir. 1957). See also *Ideal Toy Corp.* v. *J-Cey Doll Co.*, 290 F.2d 710 (2d Cir. 1961).

As with the decisions on other issues in this case, there is absolutely no support in either reason or authority for the award of attorney's fees to the plaintiff. This is yet another reason why this Court should review this matter to avoid needless confusion in this field of the law.

CONCLUSION.

Plaintiff's approach to this litigation has been the use of broadside claims, supported by little, if any, actual facts. Neither the District Court nor the Court of Appeals gave any adequate consideration to defendants' painstaking analysis of these facts which show that the claims were, for the most part, baseless. Rather, the district court in the first instance, and secondarily the Court of Appeals, were taken in by this approach, in the face of unbroken and undisputed authority which dictates a contrary holding. No reasons were given for the conclusions reached. There is absolutely no support for the award of damages against the publisher and distributor separately. The finding used to justify this award dictates that this award is erroneous, as it requires a finding at the same time that the statute of limitations has run against the publisher as to all counts and the distributor as to virtually all. Similarly, there was no support whatsoever for the award of attorney's fees.

The decisions below depart from all settled copyright law. There is a consequent violation of due process. The case must be reviewed by this Court to correct a grave injustice.

Wherefore, petitioners pray that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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APPENDIX "A"

Opinion of the U. S. Court of Appeals

ORDER

The district court found 72 separate instances of copyright infringement contained in 33 books distributed by Camerarts Publishing Co., Inc. ("Camerarts") and Allied News Co., Inc. ("Allied"). The facts are well stated in Judge Campbell's memorandum opinion. The court entered judgment against both defendants for statutory damages and attorneys' fees. Defendants appeal from the judgments against them, and plaintiff cross-appeals from the assessment of statutory damages rather than profits. We affirm.

Defendant's primary contention is that the statute of limitations (17 U.S.C. § 115(b)) bars this action. The parties stipulated, however, that Allied sold or distributed at least one copy of the 33 books within the statutory period. Since the publication of even one infringing book is sufficient to support an award of statutory damages, the statute of limitations argument is meritless as to Allied. Camerarts also contends that it did not publish any infringing books within the statutory period. The district court, however, found that Allied was Camerarts' distribution agent and, therefore, that Camerarts was in no better position than Allied to assert the statute of limitations. Since the record shows that Camerarts shipped the infringing books to Allied on a consignment basis (Tr. 1084, Stip. ¶ 9), we agree with the district court.

On 39 of the counts, appellants contend that the copying was so insubstantial as to preclude recovery for infringement. We have examined the materials pertaining to these counts and agree with the district court's evaluation. "The copying . . . consists of flagrant . . . verbatim copying and is substantial in both volume and the significance of the portions taken." A. 3a.

On the issue of damages, neither party is content with the judgment below. Appellants contend that only nominal damages should be recovered because plaintiff failed to prove any actual damages. Cross-appellant, on the other hand, argues that he made a sufficient showing of defendants' profits to require judgment for the profits, a sum supposedly much greater than the amount awarded. The district court, however, found the case appropriate for the award of statutory damages under 17 U.S.C. § 101(b), which provides that a court may award:

> "[I]n lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ."

We agree with the district court that plaintiff's proof of damages and profits was not sufficient to warrant recovery of the amounts requested and that statutory damages were appropriate. On the other hand, appellants argue in effect that if damages and profits are proved, they must be awarded; but if they are not proved, nothing can be awarded. This construction leaves no room for operation of the "in lieu of" provision and must be re-

jected. We think the provision authorizes the court to select a figure between $250 and $5,000 which it deems just in the light of the entire record. The awards in this case tended to the low side of that range, perhaps because of the number of counts, as well as the fact that in several of the counts the infringing material represented a relatively minor portion of the entire work.

In connection with the award of statutory damages, appellants argue that the separate judgments against Allied and Camerarts constitute an impermissible double recovery. They reason that if Allied was in fact Camerarts' agent, then there could be only one infringement and one recovery for each of the 72 counts. Prescinding semantics, we need merely note that it would be manifestly improper to permit recovery of profits, where they are proved, against only one of the entities in the chain of distribution. We find nothing "impermissible" about holding both consignor and consignee liable for copyright infringement.

Finally, the award of attorneys' fees was an appropriate exercise of the trial court's discretionary power under 17 U.S.C. § 116.

The judgments are *Affirmed.*

APPENDIX "B"

Opinion of the U. S. District Court

April 19, 1972

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

RICHARD S. PRATHER,

Plaintiff,

vs.

CAMERARTS PUBLISHING CO., INC., an Illinois corporation, ALLIED NEWS CO., INC., an Illinois corporation, FRANK SORREN, JOSEPH SORREN, ROBERT SORREN and JERRY M. GOFF, JR.,

Defendants.

No. 68 C 1496

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM, ORDER AND JUDGMENT

Campbell, Senior Judge.

This action was brought under the copyright laws of the United States, 17 U.S.C., Sections 101 and 112. The Plaintiff Richard S. Prather ("Prather") has written thirty-nine books which may be described generally as paperback detective or mystery novels. His writing has been prolific and profitable, having sold over 40-million copies of his books. In his testimony before the Court,

Prather advised that in terms of total sales, his achievements have been surpassed only by Earl Stanley Gardner and Mickey Spillane, the two giants in his literary art. The Plaintiff is the sole proprietor of all right, title and interest in and to the copyrights of each of the titles he has written.

Defendant, Camerarts Publishing Co., Inc. ("Camerarts"), published paperback novels under the trade name Merit Books, between February, 1960 and November, 1965. Defendant, Allied News Company ("Allied") distributed the Merit books printed and published by Camerarts. Each book involved in this suit was shipped to regional distributors on consignment and all were subject to an unlimited right of return. Defendant, Frank Sorren, was the manager of Camerarts. Defendant, Robert Sorren, was the President of Allied. Joseph Sorren, originally a Defendant in this action, has been dismissed, on motion of Plaintiff.

Jerry M. Goff, Jr. ("Goff") is the author of numerous books published under the label of Merit. Between February, 1961 and April, 1965, Camerarts published 58 paperback books under the trade name Merit from manuscripts submitted by Goff within a 3-year period. Eighteen of these books were reprints under new titles. Goff apparently produced this volume, while writing only on a part-time basis.

The Defendants, Camerarts, Allied, Frank Sorren and Robert Sorren, filed a Third Party action against Goff, and when Goff failed to appear, an order of default and default judgment were entered against him on the Third Party Complaint.

Infringement by Defendants

In the case in chief the evidence presented established without dispute that portions of the Merit Books purportedly written by Goff, published by Camerarts and distributed by Allied, contained word for word copying from books written by Prather. In many of his books, Goff found it appropriate to copy from a number of books written by Prather; he may have taken a page or less from one book and other pages from other books. The copying, where shown, consists of flagrant word for word verbatim copying, and is substantial both in volume and in the significance of the portions taken. An example of the volume is seen in the Defendants' publications, *Thrill Crazy* and *Lisa* which contain repeated copying from Plaintiff's books. In the same degree is *Irresistably Seductive Female* which contains word for word copying from Prather's books in pratically every chapter. This book contains material taken from no less than seven of Prather's publications. Similarly, twelve of the seventeen chapters in *Passion Cult* and *Seductive Nymph* contain copying from two of the Plaintiff's books.

Perhaps most important is the nature of the infringing material. In many of their Merit Books, Defendants have used Prather's copyrighted material on the cover or the first page inside the front cover, both in the form of "blurbs" and otherwise.

In numerous other instances, the Defendants copied first lines of the first chapters or the first pages of first chapters. Moreover, many of the "blurbs" preceding the chapters were taken verbatim from Prather's books.

In short, the copying by Defendants from Prather's works was repetitious and flagrant. Indeed, certain paragraphs which appeared particularly appealing were used in a number of Defendants' books. The extent to which Prather's work was used in the construction of Defendants' Merit Publications is set forth in detail in the Appendix attached to this opinion.

Accordingly, I find that the Defendants have substantially and repeatedly infringed all of the copyrights here in issue. More specifically, I find:

1. Prather's *Strip For Murder, Way Of A Wanton,* and *Three's A Shroud* were infringed by Defendants' *Thrill Crazy* and *Lisa.*

2. Prather's *Strip For Murder* and *Always Leave 'Em Dying* were infringed by the Defendants' *Passion Cult* and *Seductive Nymph.*

3. Prather's *Strip For Murder, Dagger of Flesh* and *Three's A Shroud* were infringed by Defendants' *Office Orgy.*

4. Prather's *Strip For Murder, Always Leave 'Em Dying* and *Slab Happy* were infringed by Defendants' *Jinx Broad* and *Red Hot Broad.*

5. Prather's *Strip For Murder, Always Leave 'Em Dying* and *Dagger of Flesh* were infringed by Defendants' *Time For Loving.*

6. Prather's *Strip For Murder, Kill The Clown, Always Leave 'Em Dying* and *Slab Happy* were infringed by Defendants' *Uncontrollable Urge.*

7. Prather's *Strip For Murder, Bodies In Bedlam, Dance With The Dead, Dagger of Flesh* and *Over Her Dear Body* were infringed by Defendants' *Cindy Honey.*

8. Prather's *Strip For Murder, Bodies In Bedlam, Everybody Had A Gun, Always Leave 'Em Dying, Shell Scott's Seven Slaughters, Dagger of Flesh* and *Over Her Dear Body* were infringed by Defendants' *Explosive Teaser.*

9. Prather's *Way Of A Wanton* was infringed by Defendants' *Strange Loves* and *Incredible Hunger.*

10. Prather's *Kill The Clown* was infringed by Defendants' *Beware: Woman On The Loose.*

11. Prather's *Kill The Clown, Shell Scott's Seven Slaughters, Three's A Shroud* and *Dagger of Flesh* were infringed by the Defendants' *The Genuine Wanton.*

12. Prather's *Kill The Clown* was infringed by the Defendants' *Forced* and *Bizarre Desires.*

13. Prather's *Kill The Clown, Bodies In Bedlam, Shell Scott's Seven Slaughters, Have Gat, Will Travel, Lie Down Killer, Over Her Dear Body* and *The Scrambled Yeggs* were infringed by the Defendants' *Sensual Ambitions.*

14. Prather's *Kill The Clown* was infringed by Defendants' *Search For a Lover.*

15. Prather's *Kill The Clown, Bodies In Bedlam, Everybody Had A Gun, Dance With The Dead, Shell Scott's Seven Slaughters, Three's A Shroud* and *The Scrambled Yeggs* were infringed by Defendants' *Irresistibly Seductive Female.*

16. Prather's *Kill The Clown, Bodies In Bedlam, Slab Happy, Dance With The Dead, Shell Scott's Seven Slaughters, Over Her Dear Body* and *Dig That Crazy Grave* were infringed by Defendants' *Eager Female.*

17. Prather's *Always Leave 'Em Dying* was infringed by Defendants' *I'm All Women.*

18. Prather's *Always Leave 'Em Dying* was infringed by Defendants' *Use Me.*

19. Prather's *Slab Happy* was infringed by Defendants' *Shameless* and *Abnormal Assault.*

20. Prather's *Dance With The Dead* and *Dagger of Flesh* were infringed by Defendants' *Four Aboard: 1 Man - 3 Women.*

21. Prather's *Shell Scott's Seven Slaughters* was infringed by Defendants' *Too Much Temptation.*

22. Prather's *Have Gat, Will Travel* was infringed by Defendants' *Passion Contest.*

23. Prather's *Lie Down Killer, Have Gat, Will Travel* and *Over Her Dear Body* were infringed by Defendants' *Untamed Female.*

24. Prather's *Three's A Shroud* was infringed by Defendants' *Carnal Rage.*

25. Prather's *Lie Down Killer* was infringed by Defendants' *Shocking Desire* and *Love Me Now.*

26. Prather's *Dig That Crazy Grave* was infringed by Defendants' *Wild Passion.*

The only response to this overwhelming evidence of repeated infringement offered by Defendants is the contention that the amount taken in most instances was insubstantial and therefore does not constitute infringement. In Defendant's words, "In a great many of the Counts, the infringement complained of is, in fact, so small as to constitute *de minimis.*" In other words, Defendants contend that the copying from Prather amounts to such an insubstantial bit here and there, so minor in

volume and value, that the appropriation of any part is so minor as to give rise to no cause of action. In support of this position, they rely on the reasoning of the Court in *R. L. Polk and Company* v. *Musser,* 105 F. Supp. 351 (E.D. Pa., 1952). In that case the defendant, a publisher of a name directory, copies less than 225 names out of 47,000 which were compiled in its directory. There is no similarity as between the facts in that case and those before me. Here, while in some instances the plagiarism was limited, the general course was one of flagrant violation of Prather's copyright.

Statute of Limitations

Defendants next contend that the claims of Plaintiff are for the most part barred by the statute of limitations. Specifically, Defendants argue that the Plaintiff's rights, if violated at all, were violated by Camerarts when the infringing books were first published and by Allied when it distributed the books. Defendants further argue that the last books turned over by Camerarts to Allied for distribution were delivered more than three years prior to the filing of this case and that Allied also concluded most of its dealings with the bulk of these books more than three years prior to the filing of this case. Based on these contentions, Defendants argue that the claim against Camerarts and Frank Sorren is barred in its entirety and the claim against Allied and Robert Sorren is valid only as to the books distributed within the relevant three-year period.

The applicable statute of limitations, 17 U.S.C., Section 115(b), provides as follows:

> "Civil Actions—No civil action shall be maintained under the provisions of this title unless the same is

commenced within three years after the claim accrued."

As applied to this case, first it is stipulated that two of the books published by Camerarts, *Abnormal Assault* and *Red Hot Broad,* were neither published, sold nor distributed within three years of the time this cause was commenced. Therefore, all claims relating to these two books are barred by the statute of limitations.

The parties have also stipulated that except for the two books above referred to, at least one copy of every other books was sold or distributed by Allied within three years of the time when this case was commenced. While admitting these books were distributed within the limitations period, Defendants contend that these sales do not affect the Camerarts Defendants because Camerarts had nothing to do with the books after publication and delivery to Allied. The evidence completely disputes this position taken by the Defendants. It is clear from the evidence that in distributing the books Allied acted only as an agent for Camerarts. Throughout distribution, the books were entrusted to Allied only on a consignment basis. Camerarts retained the risk of loss and Allied had a complete right of return on any book. Any unsold books were then returned for full credit. Insofar as the statute of limitations is concerned, I find no distinction between the Camerarts Defendants and the Allied Defendants.

Defendants further contend that irrespective of the relationship between Camerarts and Allied, Allied had concluded substantially all of its dealings with the infringing books prior to the limitations period. The evidence shows, however, that Allied and Camerarts were receiving re-

turns and otherwise dealing with most of the books well into the limitations period. *Maloney* v. *Stone*, 171 F. Supp. 29 (D. Mass., 1959); *Norm Company* v. *John A. Brown Company*, 26 F. Supp. 707 (Okl., 1939); *Von Tilzer* v. *Jerry Vogel Music Company*, 53 F. Supp. 191 (S.D. N.Y., 1943) aff'd. 158 F. 2d 516; and *Harry Alter Company* v. *A. E. Borden Company*, 121 F. Supp. 941 (D. Mass., 1954), relied on by Defendants, all are distinguishable on their facts.

Much of the force of Defendants' argument as to the statute of limitations is aimed at preventing an accounting for the profits they have earned on sales which may have predated the limitations period. As I shall discuss below, I do not believe this is an appropriate case for an award of Defendants' profits derived from the infringing sales and therefore much of their argument as to the application of the statute of limitations is misplaced. In any event, I am more persuaded by the rationale of the Court in *Baxter* v. *Curtis Industries, Inc.*, 201 F. Supp. 100 (N.D. Oh., 1962) holding that the statute of limitations in copyright cases, 17 U.S.C., sec. 115 (b) runs from the last infringing act. Applying that reasoning in this case, I find and conclude that Plaintiff's claims against Camerarts and Frank Sorren or Allied and Robert Sorren are not barred by the statute of limitations except insofar as those claims relate to the publication and distribution of the books *Abnormal Assault* and *Red Hot Broad*.

Damages

Plaintiff has urged that, upon a determination of liability, judgment be entered in his favor for an amount equal to the net profits obtained from their sales of the

infringing books. This amount is claimed to be $175.689.70 as against the Defendants, Camerarts and Frank Sorren, and $48,092.81 as against Defendants, Allied and Robert Sorren. These figures are based primarily on the stipulated gross profits from the sales of these books and have not taken into account most of the Defendants' expenses, which Prather convincingly contends have not been adequately established by Defendants. See 17 U.S.C. § 101(b).

Defendants in turn argue that they have adequately established substantial expenses that must be deducted before damages based on profits may be awarded. Defendants also contend that this is an appropriate case for the Court to award statutory damages, "in lieu" of actual damages and profits, as authorized by section 101 (b) of the Copyright Act. The section in substance provides that a Court may award:

> "[I]n lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ."

My own review of the Act and the cases decided thereunder, particularly *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952), leads me to conclude that in this case, where neither the extent of any of Plaintiff's injury nor the amount of Defendants' profits can be ascertained with any degree of reasonable certainty, the statutory "in lieu" measure of damages should be applied. See also, Nimmer, "The Law of Copyright" sec. 154 et. seq.

Accordingly, and pursuant to section 101(b) of the Copyright Act, I assess statutory damages in the following amounts as against these Defendants:

Count Of Plaintiff's Amended Complaint	Statutory Damages Assessed Against Defendants Camerarts and Frank Sorren, Jointly and Severally	Statutory Damages Assessed Against Defendants Allied and Robert Sorren, Jointly and Severally
1	$500.00	$250.00
2	$600.00	$250.00
3	$250.00	$250.00
4	$250.00*	$250.00
5	$250.00	$250.00
6	$250.00	$250.00
7	$250.00	$250.00
8	$250.00	$250.00
9	$500.00	$250.00
10	$350.00	$250.00
11	$250.00	$250.00
12	$250.00	$250.00
13	$300.00	$250.00
14	$250.00	$250.00
15	$250.00	$250.00
16	$250.00	$250.00
17	$250.00	$250.00
18	$250.00	$250.00
19	$300.00	$250.00
20	$250.00	$250.00
21	$250.00	$250.00
22	$250.00	$250.00

* Does not include *Red Hot Broad.*

Count Of Plaintiff's Amended Complaint	Statutory Damages Assessed Against Defendants Camerarts and Frank Sorren, Jointly and Severally	Statutory Damages Assessed Against Defendants Allied and Robert Sorren, Jointly and Severally
23	$250.00	$250.00
24	$350.00	$250.00
25	$300.00	$250.00
26	$400.00	$250.00
27	$250.00	$250.00
28	$250.00	$250.00
29	$250.00*	$250.00
30	$250.00	$250.00
31	$250.00	$250.00
32	$250.00	$250.00
33	$500.00*	$250.00
34	$250.00	$250.00
35	$250.00	$250.00
36	$300.00**	$250.00
37	$250.00	$250.00
38	$300.00	$250.00
39	$250.00	$250.00
40	$300.00	$250.00
41	$250.00	$250.00
42	$350.00	$250.00
43	$500.00	$250.00
44	$250.00	$250.00
45	$250.00	$250.00
46	$250.00	$250.00

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* Does not include *Red Hot Broad.*

** Does not include *Abnormal Assault.*

Count Of Plaintiff's Amended Complaint	Statutory Damages Assessed Against Defendants Camerarts and Frank Sorren, Jointly and Severally	Statutory Damages Assessed Against Defendants Allied and Robert Sorren, Jointly and Severally
47	$250.00	$250.00
48	$350.00	$250.00
49	$250.00	$250.00
50	$350.00	$250.00
51	$250.00	$250.00
52	$250.00	$250.00
53	$250.00	$250.00
54	$400.00	$250.00
55	$450.00	$250.00
56	$250.00	$250.00
57	$250.00	$250.00
58	$250.00	$250.00
59	$250.00	$250.00
60	$250.00	$250.00
61	$250.00	$250.00
62	$300.00	$250.00
63	$250.00	$250.00
64	$350.00	$250.00
65	$400.00	$250.00
66	$250.00	$250.00
67	$250.00	$250.00
68	$250.00	$250.00
69	$300.00	$250.00
70	$250.00	$250.00
71	$250.00	$250.00
72	$250.00	$250.00
Total Statutory Damages Awarded—	$21,000.00	$18,000.00

Costs and Attorneys' Fees

Section 116 of the Copyright Act directs the Court to allow full costs to the prevailing party and also vests the Court with the discretion to award to the prevailing party reasonable attorneys' fees as part of the costs. (17 U.S.C. sec. 116).

Based on the relevant considerations, in my view, this appears to be an appropriate case for the award of substantial attorneys' fees, particularly in view of the great volume of work devoted to successfully prosecuting this 72-Count Complaint. In my experience, this section has been rather sparingly used in this District and awards where granted, have been modest in amount. With these facts in mind, I have determined that an award in the total amount of $4,000.00 is appropriate here. This award shall be divided as between the Defendants as follows: Defendants, Camerarts and Frank Sorren, jointly and severally, shall pay to Plaintiff $3,000.00 in attorneys' fees; Defendants, Allied and Robert Sorren, jointly and severally shall pay to the Plaintiffs, the amount of $1,000.00 in attorneys' fees.

Judgment

Upon the findings of fact and conclusions of law set forth herein, it is ordered that judgment be and the same is hereby entered for Plaintiff, Richard S. Prather and against Defendants, Camerarts Publishing Co., Inc. and Frank Sorren, jointly and severally for $21,000.00, plus costs, including $3,000.00 in attorneys' fees, and that judgment be entered in favor of Plaintiff, Richard S. Prather, and against Defendants, Allied News Service, Inc. and Robert Sorren, jointly and severally in the amount of $18,000.00 plus costs and $1,000.00 in attorneys' fees.

Enter:

/s/ William J. Campbell

April 19, 1972

APPENDIX

Summary of Infringement By Defendants

Infringing Merit Books: *Thrill Crazy* and *Lisa.*

Prather Copyrights infringed: *Strip for Murder, Way of a Wanton* and *Three's a Shroud.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 2		
13-14	*Strip For Murder*	55-56
15-18	" " "	127-130
20	" " "	130
21-24	" " "	57-59
Ch. 3		
32	*Three's A Shroud*	47-48
Ch. 4		
34	*Way of a Wanton*	5
34-40	" " " "	43-51
Ch. 5		
41-42	*Way of a Wanton*	51
Ch. 13		
105-110	*Way of a Wanton*	86-89
Ch. 15		
118	*Three's A Shroud*	151
118-119	" " "	87
120-121	*Way of a Wanton*	57
Ch. 17		
137-138	*Three's A Shroud*	152-153
139	" " "	65

Infringing Merit Books: ***Passion Cult*** **and** ***Seductive Nymph.***

Prather copyrights infringed: ***Strip for Murder*** **and** ***Always Leave 'Em Dying.***

Infringing Merit Books	*Prather Books Infringed*	
Inside front cover blurb	*Always Leave 'Em Dying*	73
Ch. 1		
7-9	*Always Leave 'Em Dying*	24-26
16	*Strip For Murder*	
17	*Strip For Murder*	29
Ch. 3		
35	*Strip For Murder*	22-23
36	" " "	25
37	" " "	28-29
Ch. 4		
46	*Strip For Murder*	40
Ch. 5		
Chapter heading blurb	*Strip For Murder*	36
50	" " "	36
50-51	" " "	37
52	" " "	40-41
53-55	" " "	41-43
Ch. 6		
57	*Strip For Murder*	44
58	" " "	44
58	" " "	45

60-62	" " "	34-36
Ch. 8		
76	*Strip For Murder*	78-79
76	" " "	78
76-77	" " "	79
77	*Always Leave 'Em Dying*	71
77	" " " "	72
77-78	" " " "	73
78	" " " "	73 (top)
78	" " " "	73 (bottom)
78	" " " "	77
78-79	" " " "	108
79	*Strip For Murder*	79
80	" " "	79
Ch. 9		
Chapter heading blurb	*Strip For Murder*	81
82-86	" " "	79-81
87	" " "	38
88	" " "	88-89
Ch. 10		
95	*Strip For Murder*	94
97	" " "	95
Ch. 11		
99	*Strip For Murder*	46
99-100	" " "	76-77
101	*Always Leave 'Em Dying*	20
102	" " " "	21
104	" " " "	21
Ch. 13		
121	*Strip For Murder*	59

122	" " "	59
Ch. 16		
144	*Always Leave 'Em Dying*	79-80
145	" " " "	105

Infringing Merit Book: *Office Orgy.*
Prather Copyrights Infringed: *Strip For Murder, Dagger of Flesh* and *Three's A Shroud.*

Infringing Merit Books	*Prather Books Infringed*	
Blurb inside front cover	*Dagger of Flesh*	91
Ch. 10		
Chapter heading blurb—83	*Dagger of Flesh*	91
84-85	*Strip For Murder*	17-18
87	*Three's A Shroud*	127
90	*Strip For Murder*	77
90-91	" " "	78-79
91	*Dagger of Flesh*	91
92	" " "	91
92-93	" " "	45-46
Ch. 11		
94-95	*Strip For Murder*	78-80

Infringing Merit Books: *Jinx Broad* and *Red Hot Broad.*
Prather Copyrights Infringed: *Strip For Murder, Always Leave 'Em Dying* and *Slab Happy.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 2		
26-27	*Slab Happy*	13-14
30	" "	96

30	" "	97
31	" "	99
32	" "	101
Ch. 5		
Chapter heading blurb—40	*Slab Happy*	47
40-41	" "	47
41	" "	34
Ch. 7		
63	*Slab Happy*	122
Ch. 10		
85	*Slab Happy*	30
85-86	" "	90
86	" "	99
Ch. 13		
104	*Always Leave 'Em Dying*	72-73
104-105	*Strip For Murder*	79
Ch. 14		
110	*Strip For Murder*	94
110	*Always Leave 'Em Dying*	108

Infringing Merit Book: *Time For Loving.*
Prather Copyrights Infringed: *Strip For Murder, Always Leave 'Em Dying* and *Dagger of Flesh.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 4		
33-34	*Dagger of Flesh*	90-91
Ch. 9		
71-72	*Always Leave 'Em Dying*	72-73
72	*Strip For Murder*	79

Infringing Merit Book: *Uncontrollable Urge.*
Prather Copyrights Infringed: *Strip For Murder, Kill the Clown, Always Leave 'Em Dying* and *Slab Happy.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 4		
37-38	*Slab Happy*	13-14
38-39	" "	34
39	" "	37 (middle)
39	" "	37 (top)
Ch. 5		
48	*Kill The Clown*	70
48	" " "	137
57	*Always Leave 'Em Dying*	72-73
57-58	*Strip For Murder*	79
Ch. 6		
61	*Strip For Murder*	94
61-62	*Always Leave 'Em Dying*	108

Infringing Merit Book: *Cindy Honey.*
Prather Copyrights Infringed: *Strip For Murder, Bodies in Bedlam, Dance With The Dead, Dagger of Flesh* and *Over Her Dear Body.*

Infringing Merit Books	*Prather Books Infringed*	
Back Cover	*Dance With The Dead*	71
Ch. 4		
46-47	*Strip For Murder*	78-79
47	*Dagger of Flesh*	91
48	" " "	91

48	" " "	48
Ch. 6		
63	*Over Her Dear Body*	144-145
63	*Bodies In Bedlam*	16-17
63-64	*Over Her Dear Body*	145-146
64	" " " "	148-149
Ch. 9		
85-89	*Dance With The Dead*	7-15
90	" " " "	83
93-94	" " " "	15-16
Ch. 10		
102-104	*Dance With The Dead*	70-71

Infringing Merit Book: *Explosive Teaser.*

Prather Copyrights Infringed: *Strip For Murder, Bodies In Bedlam, Everybody Had A Gun, Always Leave 'Em Dying, Shell Scott's Seven Slaughter, Dagger of Flesh* and *Over Her Dear Body.*

Infringing Merit Books	*Prather Books Infringed*	
Inside front cover blurb	*Always Leave 'Em Dying*	72-73
Ch. 2		
25	*Over Her Dear Body*	35
Ch. 3		
32-33	*Always Leave 'Em Dying*	72-73
33	*Strip For Murder*	79
Ch. 4		
38-39	*Everybody Had A Gun*	93
39-42	" " " "	95-96
Ch. 5		
45-46	*Dagger of Flesh*	58-59

Ch. 7		
73-74	*Everybody Had A Gun*	14-15
77	*Shell Scott's Seven Slaughter*	125
Ch. 8		
85-86	*Everybody Had A Gun*	89-90
86-87	*Shell Scott's Seven Slaughter*	80
Ch. 11		
112	*Everybody Had A Gun*	26-27
113	*Shell Scott's Seven Slaughter*	105
Ch. 12		
121	*Everybody Had A Gun*	140
121	" " " "	141
121-122	*Bodies In Bedlam*	64
122-123	*Everybody Had A Gun*	141-142
123-127	" " " "	145-149
127-128	*Bodies In Bedlam*	20-22
Ch. 13		
129-130	*Bodies In Bedlam*	91
130-138	" " "	113-118
Ch. 14		
139-147	*Bodies In Bedlam*	118-123
Ch. 15		
148-149	*Bodies In Bedlam*	123-124

Infringing Merit Books: *Strange Loves* and *Incredible Hunger.*

Prather Copyrights Infringed: *Way Of A Wanton.*

Infringing Merit Books	*Prather Books Infringed*	
53	*Way of a Wanton*	5
53	" " " "	6
53	" " " "	7
53-54	" " " "	10
54	" " " "	13-14
55-62	" " " "	20-30

Infringing Merit Book: *Woman On The Loose.*
Prather Copyright Infringed: *Kill The Clown.*

Infringing Merit Books	*Prather Books Infringed*	
27-30	*Kill The Clown*	61-63
34	" " "	64
39-41	" " "	139-141

Infringing Merit Book: *The Genuine Wanton.*
Prather Copyrights Infringed: *Kill The Clown, Shell Scott's Seven Slaughter, Three's A Shroud* and *Dagger of Flesh.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 1		
6-11	*Dagger of Flesh*	5-8
Ch. 2		
12-14	*Dagger of Flesh*	5-8
14	*Three's A Shroud*	10
15-17	*Dagger of Flesh*	39-44
17	*Three's A Shroud*	11
17	" " "	13
17	*Dagger of Flesh*	24
17-18	*Three's A Shroud*	13

18-21	*Dagger of Flesh*	24-27
Ch. 3		
21-22	*Dagger of Flesh*	27-38
24-26	*Kill The Clown*	13-16
27-28	" " "	84
28-29	" " "	149-151
Ch. 4		
32-34	*Dagger of Flesh*	88-90
Ch. 5		
37	*Three's A Shroud*	35
Ch. 6		
42-51	*Shell Scott's Seven Slaughter*	135-141
Ch. 7		
52	*Shell Scott's Seven Slaughter*	143-144
52-55	" " "	154-157
55	" " "	159-160
Ch. 8		
58-59	*Shell Scott's Seven Slaughter*	68
59-62	" " "	70-72
62-63	" " "	93
63	" " "	96
63-65	" " "	98-99
Ch. 10		
76	*Kill The Clown*	5
76-77	*Three's A Shroud*	126-127
77-78	" " "	131-133
Ch. 11		
78-80	*Three's A Shroud*	133-134
80	*Kill The Clown*	70
80	" " "	71
80-81	" " "	137

Infringing Merit Books: *Forced* and *Bizarre Desires.*
Prather Copyright Infringed: *Kill The Clown.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 9		
69	*Kill The Clown*	70-71
70	" " "	137
Ch. 15		
109	*Kill The Clown*	18-19
110-111	" " "	20
Ch. 17		
124	*Kill The Clown*	32
124-125	" " "	57
Ch. 18		
130	*Kill The Clown*	135
130	" " "	136
130-131	" " "	174
Ch. 22		
157	*Kill The Clown*	109

Infringing Merit Book: *Sensual Ambitions.*
Prather Copyrights Infringed: *Kill The Clown, Bodies In Bedlam, Shell Scott's Seven Slaughter, Have Gat Will Travel, Lie Down Killer, Over Her Dear Body* and *The Scrambled Yeggs.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 1		
7	*Shell Scott's Seven Slaughter* (first page of story)	7
Ch. 2		

15	*Shell Scott's Seven Slaughter*	7
16	*Kill The Clown*	33
17	" " "	135
19	" " "	32
19-20	" " "	57
20-22	" " "	33-34
23	" " "	58
Ch. 4		
43-44	*Have Gat Will Travel*	77-78
44-45	" " " "	44-45
Ch. 5		
50-53	*Kill The Clown*	37-39
55-58	*Over Her Dear Body*	41-43
Ch. 6		
59-68	*Over Her Dear Body*	43-48
69	" " " "	51
70	" " " "	51
Ch. 7		
72-76	*Over Her Dear Body*	55-57
76-83	*Have Gat Will Travel*	117-124
Ch. 8		
86-87	*The Scrambled Yeggs*	100
91	" " "	100
Ch. 9		
94-96	*Bodies In Bedlam*	104-106
Ch. 11		
127	*Have Gat Will Travel*	103
Ch. 12		
128-132	*Have Gat Will Travel*	103-107
Ch. 13		
139-140	*Over Her Dear Body*	79-80
143-147	*Lie Down Killer*	113-116

149	" " "	121
Ch. 14		
150-151	*Lie Down Killer*	122
153-155	" " "	124-126

Infringing Merit Book: *Search For A Lover.*
Prather Copyright Infringed: *Kill The Clown.*

Infringing Merit Books	*Prather Books Infringed*
	Kill The Clown
31-32	70
32	71
32	137

Infringing Merit Book: *Irresistibly Seductive Female.*
Prather Copyrights Infringed: *Kill The Clown, Bodies In Bedlam, Everybody Had A Gun, Dance With The Dead, Shell Scott's Seven Slaughter, Three's A Shroud,* and *The Scrambled Yeggs.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 1		
Editor's burb for ch.	*Shell Scott's Seven Slaughter*	65
7	" " "	64-65
Ch. 2		
20-21	*Shell Scott's Seven Slaughter*	11
Ch. 3		
31	*Three's A Shroud*	59
Ch. 4		
42-43	*Everybody Had A Gun*	27
43	" " " "	30
43	" " " "	64

43	" " " "	88
Ch. 5		
Chapter heading blurb	*Everybody Had A Gun*	93
49	*Shell Scott's Seven Slaughter*	67-68
49-52	*Three's A Shroud*	63-65
52-53	*Everybody Had A Gun*	91-93
53-58	*Shell Scott's Seven Slaughter*	59-62
Ch. 6		
Chapter heading blurb	*Shell Scott's Seven Slaughter*	77
60-61	" " "	76-77
Ch. 7		
68-74	*Shell Scott's Seven Slaughter*	21-25
75-77	*Dance With The Dead*	193-196
Ch. 8		
78-80	*Dance With The Dead*	114-116
80-81	" " " "	83
Ch. 9		
86	*Dance With The Dead*	137
87-88	*Everybody Had A Gun*	78
89	*Kill The Clown*	70
89-90	*Kill The Clown*	137
Ch. 10		
Ch. 11		
108-113	*Everybody Had A Gun*	33-35
Ch. 12		
115-117	*Bodies In Bedlam*	110-112
Ch. 13		
Ch. 14		
132-135	*Everybody Had A Gun*	133-135

Ch. 15		
145	*The Scrambled Yeggs*	23
Ch. 16		

Infringing Merit Book: *Eager Female.*

Prather Copyrights Infringed: *Kill The Clown, Bodies In Bedlam, Slab Happy, Dance With The Dead, Shell Scott's Seven Slaughter, Over Her Dear Body,* and *Dig That Crazy Grave.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 2		
18-21	*Over Her Dear Body*	144-149
21	*Bodies In Bedlam*	84
21-22	" " "	83-84
Ch. 3		
22-23	*Bodies In Bedlam*	84-85
25-26	" " "	85
Ch. 5		
35	*Kill The Clown*	71
Ch. 8		
56-57	*Shell Scott's Seven Slaughter*	11
Ch. 13		
89	*Slab Happy*	27
89-91	" "	28-29
91-92	*Dig That Crazy Grave*	41-42
92-93	*Slab Happy*	30-31
93-96	*Over Her Dear Body*	140-141
Ch. 14		
96-97	*Strip For Murder*	113
97	*Dance With The Dead*	172

97-103	" " " "	193-198
Ch. 15		
103-114	*Over Her Dear Body*	166-175
Ch. 16		
114-119	*Over Her Dear Body*	175-181
Ch. 17		
120	*Over Her Dear Body*	181

Infringing Merit Book: *I'm All Woman.*
Prather Copyright Infringed: *Always Leave 'Em Dying.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 1		
Opening Paragraph	*Always Leave 'Em Dying*	24

Infringing Merit Book: *Use Me.*
Prather Copyright Infringed: *Always Leave 'Em Dying.*

Infringing Merit Books	*Prather Books Infringed*	
Pages 108-109	*Always Leave 'Em Dying*	61-64

Infringing Merit Books: *Shameless* and *Abnormal Assault.*
Prather copyright infringed: *Slab Happy.*

Infringing Merit Books	*Prather Books Infringed*		
Ch. 6	*Slab Happy*		
46	100	"	"
Ch. 8			
Chapter leading blurb, 52	99	"	"
55	99	"	"
56	100	"	"

Ch. 12			
73-74	107	"	"
74	136	"	"
Ch. 21			
124-126	136-138	"	"

Infringing Merit Book: *Four Aboard: 1 Man - 3 Women.*
Prather Copyrights Infringed: *Dance With The Dead* and *Dagger of Flesh.*

Infringing Merit Books	*Prather Books Infringed*	
29	*Dagger of Flesh*	91
29-30	" " "	45-46
38-39	*Dance With The Dead*	115-116

Infringing Merit Book: *Too Much Temptation.*
Prather Copyright Infringed: *Shell Scott's Seven Slaughters.*

Infringing Merit Books	*Prather Books Infringed*	
10-11	*Shell Scott's Seven Slaughters*	103-104

Infringing Merit Book: *Passion Contest.*
Prather Copyright Infringed: *Have Gat Will Travel.*

Infringing Merit Books	*Prather Books Infringed*	
155-158	*Have Gat Will Travel*	68-69 and 73-74

Infringing Merit Book: *Carnal Rage.*
Prather Copyright Infringed: *Three's A Shroud.*

Infringing Merit Books	*Prather Books Infringed*	
52-59	*Three's A Shroud*	72-77

Infringing Merit Books: *Shocking Desire* and *Love Me Now.*
Prather Copyright Infringed: *Lie Down Killer.*

Infringing Merit Books	*Prather Books Infringed*	
120-130	*Lie Down Killer*	27-29

Infringing Merit Book: *Wild Passion.*
Prather Copyright Infringed: *Dig That Crazy Grave.*

Infringing Merit Books	*Prather Books Infringed*	
Ch. 6		
54-56	*Dig That Crazy Grave*	95-98
58	" " " "	93
59	" " " "	93
60	" " " "	94
Ch. 10		
91-92	" " " "	53-54
Ch. 11		
97-99	" " " "	5-6
104	" " " "	7

Infringing Merit Book: *Untamed Female.*
Prather Copyright Infringed: *Lie Down Killer.*

Infringing Merit Books	*Prather Books Infringed*	
11-24	*Lie Down Killer*	35
82	" " "	37-38
	" " "	49-53
	" " "	55

APPENDIX "C"

Order of the U. S. Court of Appeals

August 3, 1973

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

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MICHAEL RODAK, JR., CLERK

No. 73-614

In the Supreme Court of the United States

OCTOBER TERM, 1973

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

VS.

RICHARD S. PRATHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The district court found that thirty-three books allegedly written by Jerry M. Goff, Jr. and published and/or sold by the defendants were constructed, to a greater or lesser degree, from sixteen books written by the plaintiff, Richard S. Prather. The only extraordinary element of this case is

that no other court has reported such massive plagiarism where sixteen books written by an author were cannibalized to produce thirty-three books for infringers. In one instance, portions from seven of the plaintiff's books were scattered throughout one of the defendants' books.

In the courts below, this case turned upon various issues relating to the burden of proof. In light of the word-for-word copying engaged in by the defendants, the plaintiff easily satisfied his burden of proving infringement. In their petition, as in the courts below, defendants seek to shift the burden of proving their defenses to the plaintiff. The defendants asserted the statute of limitations, but their evidence did not prove they ceased infringing more than three years prior to the filing of the amended complaint. The defendants contended that not all of the material in their infringing books was stolen from the plaintiff, but failed to prove a reasonable means of apportioning their profits other than to argue that the infringement was *de minimus,* an argument considered and rejected by the courts below.

Defendants have had their day in court, and they have raised no issues in their petition that entitles them to a further review.

II.

PLAINTIFF WAS PROPERLY GRANTED SEPARATE JUDGMENTS AGAINST THE SEVERAL DEFENDANTS BASED ON THEIR SEPARATE ACTS OF INFRINGEMENT.

The district court found that defendant Camerarts Publishing Co., Inc. ("Camerarts"), which published the infringing books under the trade name "Merit Books," and defendant Allied News Service, Inc. ("Allied"), the distributor of the infringing books, were each liable for statu-

tory damages. Judgment in the minimum amount of $250.00 was entered against Allied for each of the seventy-two counts of the complaint, and judgment for statutory damages ranging from $250.00 to $600.00 was entered against Camerarts for each of the seventy-two counts of the complaint.* Defendants argue that this amounted to a double recovery for plaintiff.

In their petition, defendants claim that decisions of the courts below granting separate "in lieu of" recoveries to the plaintiff against the defendants are contrary to all other decisions involving the "in lieu of" clause. The recent authorities cited by defendants do not support this contention. Only one case, which was decided in 1916, supports defendants' position. *Gross* v. *Van Dyk Gravure Co.*, 230 Fed. 412 (2d Cir. 1916).

In *Screen Gems-Columbia Music, Inc.* v. *Metlis & Lebow Corp.*, 453 F.2d 552 (2d Cir. 1971), the plaintiff was not awarded damages based on the "in lieu of" clause, but was awarded the 2¢ per phonograph record statutory royalty granted by 17 U.S.C. §1(e). Thus, the court granted judgment in the amount of the full royalty that the plaintiff could have collected, and the court found that the plaintiff was entitled to no more than this maximum amount from all defendants involved with a single act of infringement, the sale. (At p. 554)

No damages were awarded in *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957). Furthermore, the court's discussion supports plaintiff. The court quotes from a 1922

---

* Defendant Frank Sorren, an officer of Camerarts, and defendant Robert Sorren, an officer of Allied, were each held jointly and severally liable with their respective corporations.

Second Circuit case to the effect that the publisher is an infringer and the vendor is an infringer. Each committed a separate act of infringement. Since the court found that there was no infringement, its discussion of damages was irrelevant; nevertheless, the court stated that it would have assessed damages against the seller in the amount of no more than $250, but would not charge the seller with the *profits* of the printer who was not joined as a party.

Another case cited by defendants is *H. M. Kolbe Co.* v. *Shaff*, 240 F.Supp. 588 (S.D.N.Y. 1965), *aff'd*, 352 F.2d 285 (2d Cir. 1965). This case does not support defendants' argument because the court awarded damages and profits rather than utilizing the "in lieu of" clause. Nevertheless, the case is in agreement with the decisions of the lower courts in the instant case insofar as it involved the question of whether a corporate officer who participated in the infringement was equally liable with his principal, the corporation. The court held that there was one act of infringement and that the officer who participated was liable. In the instant case, the district court adopted the same ruling by holding that defendant Frank Sorren was jointly and severally liable with defendant Camerarts, of which he was an officer, in connection with the publication and sale of the infringing materials. It also held that defendant Robert Sorren and defendant Allied, of which he was an officer, were jointly and severally liable in connection with the sale of the infringing materials.

Not only did the court fail to provide any discussion with regard to its statement in *Detective Comics, Inc.* v. *Bruns Publications, Inc.*, 28 F.Supp. 399 (S.D.N.Y. 1939), it is not clear from the reported decision whether the court awarded actual profits and damages or damages under the

"in lieu of" clause. The court merely says that it awarded the plaintiff's damages and the defendant's profits. (At p. 401)

The decisions of the courts below granting separate damages are reasonable and consistent with the plain language of statute.

On page 9 of the petition, defendants quote the following from the court of appeals:

> "We find nothing 'inpermissible' about holding both consignor and consignee liable for copyrighting infringement."

Defendants fail to provide this court with the proceeding language, which was the following:

> "Prescinding semantics, we need merely note that it would be manifestly improper to permit recovery of profits, where they are proved, against only one of the entities in the chain of distribution." (A.3(a))

In the courts below, the plaintiff argued vigorously that he was entitled to recover the profits of both the publisher and the distributor. Based upon the evidence before them, both courts below rejected this argument and approved the use of the "in lieu of" clause. Had such profits been awarded, plaintiff would have been entitled to the individual profits of each infringer. Both the publisher and the distributor infringed the plaintiff's federally protected copyrights, and there is no reason why plaintiff was not entitled to be awarded separate "in lieu of" damages against *each* infringer.

Probably because the results reached below were so reasonable, there has been very little discussion of this issue in the cases. There are several cases in which the courts consider whether one infringer should be liable for the

profits of the other. In *Sammons* v. *Larkin,* 38 F. Supp. 649 (D.Mass 1940), the court held that one infringer was not liable for the profits of the other infringer. (At. p. 655) The court then awarded the plaintiff the profits of one of the defendants and granted the minimum statutory damage of $250 against the other defendant, which had no profits. In *Greenbie* v. *Noble, supra,* the court conjectured that it would have assessed statutory damages against the seller of the infringing materials but would not charge the seller with the profits of the printer.

III.

DEFENDANTS DID NOT MEET THEIR BURDEN OF PROVING THAT THE STATUTE OF LIMITATIONS WAS APPLICABLE.

The applicability of the statute of limitations to the plaintiff's claims was a question of evidence decided adversely to the defendants by the courts below. In their petition, the defendants attempt to make up in argument what they failed to prove to the courts below.

In their recitation of the facts, the defendants misstate the evidence. The circuit court (A.1a) and the district court (A.11a) both noted that the parties agreed that at least one copy of each infringing book, with two exceptions, was published, sold and distributed by defendants within three years of the time when the instant case was commenced. In fact, the district court found:

> "[T]hat Allied and Camerarts were receiving returns and otherwise dealing with most of the books well into the limitations period." (A.11a-12a)

Defendants also complain that there was no support for the findings of the courts below that the infringing books were sold on consignment. Here again, defendants ask this court to disregard the stipulation of the parties that the books were sold on consignment.

In their petition, as below, defendants attempt to make the argument that the statute of limitations commenced from the first act of infringement. Defendants failed to cite the case upon which the district court relied, which is the only reported decision dealing specifically with the application of the 17 U.S.C. §115(b), a section that was added by amendment in 1957. This case is *Baxter* v. *Curtis Industries, Inc.,* 201 F.Supp. 100 (N.D. Ohio 1962). In this case, the court held that the statute of limitations contained in 17 U.S.C. §115(b) did not begin to run until the *last* act of infringement. The court explained the reasons behind the enactment of 17 U.S.C. §115(b) as follows:

> "Based on the foregoing, it appears that prior to the 1957 Amendment of Sec. 115(b) the rule as to copyright infringement actions was, that the period of limitation began from the date of the last infringing act.
>
> "It is the opinion of the Court that the amendment was not intended to, and did not, change this basic concept. It simply made uniform a three-year limitation dating from the last act of infringement, in place of the multitude of state limitation periods. It is a remedial measure and should operate as such.
>
> "The complaint alleged a continuous infringement from February 1958 to the date of the complaint. There is no denial of this allegation by the defendant, and it must be presumed true for the purposes of this motion." 201 F.Supp. 100, 101

The essential question is whether copyright infringement should be viewed as a whole, continuous act or whether the sale of each infringing book is to be considered, in and of itself, a copyright violation. The statutory scheme of compensating a plaintiff that is set forth in 17 U.S.C. §101 provides, as an alternative remedy, minimum and maximum awards for copyright infringment. It is obvious that §101 contemplates copyright infringement as a unitary act; otherwise, each book published, distributed or sold by a defendant within the three year period could be a separate act of infringement to which the minimum statutory damage of $250.00 would be applicable. Thus, the publication, distribution, or sale by the defendants of 20 copies of each book could result in a recovery by plaintiff of $5,000, and the publication, distribution or sale of 100 books could result in the minimum statutory damages of $25,000. It has been held that multiple reproductions of the same infringing article constitute one claim for damages under 17 U.S.C. §101. See *Davis* v. *E.I. Du Pont De Nemours & Co.,* 249 F.Supp. 329, 322-343 (S.D. N.Y. 1966).

The only reasonable conclusion is the one adopted by the district court: that the limitations' period in 17 U.S.C. §115(b) does not commence to run until the last act of infringement that continues over a span of time.

Maloney v. *Stone,* 171 F.Supp. 29 (D.Mass. 1959), cited by defendants on page 13 of the petition, is not in point. In this case, the court held that a printer had ceased to infringe more than two years before the suit was brought. Unlike the instant situation, where Camerarts retained title to the books which were sold by it on consignment, the printer had terminated all manufacturing, had turned over all plates and materials and had terminated the contract. 171 F.Supp. 29,31.

Finally, defendants cite an antitrust case, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in connection with their defense. (Petition, p. 13) The statute applicable to a continuing conspiracy under the antitrust law does not apply to an action for copyright infringement. The nature of §101 of the Copyright Statute cuts against defendants' argument. Earlier in this brief the plaintiff discussed why copyright infringement must be treated as a continuous act and not broken up as suggested by the defendants; to do so would make each sale a separate cause of action for which the plaintiff is entitled to the $250 minimum statutory award. Applying this same reasoning to *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* each sale of a book by the defendants would constitute a separate claim, and, as to each sale, the plaintiff would be entitled to the $250 minimum.

Neither the evidence nor the law sustains defendants' position that they ceased their infringing activities within three years of the filing of the Amended Complaint.

IV.

INFRINGEMENT WAS CLEAR, AND DEFENDANTS FAILED TO PROVE A REASONABLE STANDARD FOR APPORTIONING PROFITS OR DAMAGES.

As with the statute of limitations defense, defendants seek to elevate their failure of proof in the courts below to matters that will "throw needless confusion into the field of copyright, and subject these defendants to unsupportable injustice." (Petition, p. 23) Defendants fail to point out to this court that they were engaged in the most widespread instance of multiple copyright infringement that has ever been reported. Defendants seek to ignore that thirty-three books they published, sold and distributed infringed sixteen of the plaintiff's copyrights.

The district court found that the Merit Books in issue "contained word-for-word copying from books written by Prather." (A. 6a) The district court also found as follows:

> "The copying, where shown, consists of flagrant word for word verbatim copying and is substantial in both volume and the significance of the portions taken." (A. 6a)

It is plaintiff's position, well supported by law, that once infringement was proven as to parts of a book published and sold by the defendants, the burden of proving a reasonable means of apportionment, if there can be one, is on the defendants. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940); *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120-21 (2d Cir. 1962); *Smith* v. *Little, Brown & Co.*, 273 F.Supp. 870, 874 (S.D.NY. 1967), *aff'd*, 396 F.2d 150 (2d Cir. 1968). Instead of meeting their burden by suggesting to the courts below a method of apportionment for each of their infringing books, the defendants asked the courts to eliminate in their entirety any claim for infringement based upon thirty-nine examples of plagiarism shown in thirty-nine counts of the complaint.

In essence, defendants' argument is that, because many of the books that they published were cannibalized from a number of books written by the plaintiff, instead of just one, they should not be liable for any copyright infringement. There is no reason why defendants should be in a better position because their books copied a few pages from a number of the plaintiff's books rather than all from one of plaintiff's books. By defendants' theory, they could publish a novel of 100 pages containing two pages from each of 50 of the plaintiff's books and not be liable for copyright infringement. This would be an absurd result.

Defendants cite certain cases in an attempt to bolster their position that stealing just a little bit is not copyright infringement. If the court were dealing with one paragraph from one of the plaintiff's books and one paragraph from one of the defendants' books, perhaps the defendants would have an argument; however, this is not the case. As the plaintiff has pointed out, many of the Merit Books involved contain word-for-word copying from a number of the plaintiff's books. Copying, if proven, is copying, whether it is a little bit or a lot. After the plaintiff establishes that one of the defendants' books had been constructed, in whole or in part, from one or more of his books, he is entitled to all or part of the defendants' profits.

Most of the cases cited by the defendants on page 15 of their petition miss the point. The defendants key on the words "material" or "substantial" copying. The question before most of the courts was whether there was sufficient *similarity* between the alleged infringing work and the plaintiff's work so that infringement could be found. One test of infringement is similarity, but another test of infringement is *identical, word-for-word* copying. In the instant case, we are considering, for the most part, word-for-word copying. In *Heim* v. *Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946), and *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F.Supp. 415 (S.D.N.Y. 1971), the courts found no copying whatsoever. In *Solomon* v. *RKO Radio Pictures*, 44 F.Supp. 780 (S.D.N.Y. 1942), and *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F.Supp. 788 (S.D.N.Y. 1971), the courts found that there was only a similarity. Other cases cited by the defendants involve copying photographs from catalogs, which is hardly a fair test to apply to word-for-word copying of the plaintiff's fiction. A quote from Nimmer on Copyright, which appears on pages 15 to 16 of defendants' petition, is also inapposite because the

instant case does not concern "the quantum of fragmented literal similarity," but it deals with substantial literal identity.

A. The Quality and Quantity of the Infringement

There are a number of ways in which the quality and quantity of the infringement by the defendants from the plaintiff's books can be viewed. These will be discussed below, with examples.

1. The Physical Bulk of the Copying

The Appendix to the district court's opinion shows the sources for each Merit Book that has materials taken from the plaintiff's books. The number of pages of the infringing books on which copying appears does not do justice to the extent of copying. For example, direct copying appears on thirty-four pages of *Thrill Crazy* and its reprint, *Liza,* which is a 140 page book. However, this copying is spread throughout *Thrill Crazy* and *Lisa* and constitutes the major material in the book, the rest of which is more or less filler. When *Thrill Crazy* and *Lisa* are broken down, the following appears:

Thrill Crazy & Lisa	Prather, Book and Pages	
13-14	*Strip For Murder*	55-56
15-18	" " "	127-130
20	" " "	130
21-24	" " "	57-59
32	*Three's A Shroud*	47-48
34	*Way Of A Wanton*	5
34-42	" " "	43-51
105-110	" " "	86-89
118-119	*Three's A Shroud*	157, 87
120-121	*Way Of A Wanton*	57
137-138	*Three's A Shroud*	152-153
139	" " "	65

The plaintiff can conceive of no way in which the defendants could undo the commingling of passages from the plaintiff's books that make up *Thrill Cray* and *Lisa.*

Another example of the piecing together done by the author of the infringing books is *Irresistibly Seductive Female.* Thirteen of the sixteen chapters in *Irresistibly Seductive Female* contain word-for-word copying. A chapter by chapter analysis of *Irresistibly Seductive Female* shows the following word-for-word copying:

Irresistibly Seductive Female	Prather, Book and Pages	
Ch. 1		
Editor's blurb for chapter	*Shell Scott's Seven Slaughters*	65
7	" " " "	64-65
Ch. 2		
20-21	" " " "	11
Ch. 3		
31	*Three's A Shroud*	59
Ch. 4		
42-43	*Everybody Had A Gun*	27
43	" " "	30
43	" " "	64
43	" " "	88
Ch. 5		
Editor's blurb for chapter	" " "	93
49	*Shell Scott's Seven Slaughters*	67-68
49-52	*Three's A Shroud*	63-65
52-53	*Everybody Had A Gun*	91-93
53-58	*Shell Scott's Seven Slaughters*	59-62

Ch. 6		
Editor's blurb		
for chapter	*Shell Scott's Seven Slaughters*	77
60-61	" " " "	76-77
Ch. 7		
68-74	" " " "	21-25
75-77	*Dance With The Dead*	193-196
Ch. 8		
78-80	*Dance With The Dead*	114-116
80-81	" " "	83
Ch. 9		
86	*Dance With The Dead*	137
87-88	*Everybody Had A Gun*	78
89	*Kill The Clown*	70
89-90	" " "	137
Ch. 10		
-	-	-
Ch. 11		
108-113	*Everybody Had A Gun*	33-35
Ch. 12		
115-117	*Bodies In Bedlam*	110-112
Ch. 13		
-	-	-
Ch. 14		
132-135	*Everybody Had A Gun*	133-135
Ch. 15		
145	*The Scrambled Yeggs*	23
Ch. 16		
-	-	-

When the plagiarizer scatters stolen material from seven of the plaintiff's books throughout the infringing book, there can be no reasonable method of apportionment. Without the materials stolen from the plaintiff's books, which

comprise fight scenes, sex scenes, and clever descriptions, there would have been no *Irresistibly Seductive Female.*

Other examples are *Passion Cult* and its reprint, *Seductive Nymph.* These appear to contain 160 pages; however, there is a blank page at the end of each chapter, which reduces the number of printed pages by seventeen. Twelve of the seventeen chapters in *Passion Cult* and *Seductive Nymph* contain copying from two books by the plaintiff, *Always Leave 'Em Dying* and *Strip for Murder.* One of the major plot lines of the books, hiring a detective to work in a nudist camp, was stolen directly from the plaintiff's book entitled *Strip for Murder.*

2. The Importance of the Materials Stolen

One gauge of the plagiarized material's importance can be found by noting the significance of the stolen material to the plaintiff's books or the importance of where the stolen material was placed in the Merit Books. For this reason, the district court considered the covers of books, publisher's blurbs, the first lines of the books, and the beginnings and endings of chapters. (A. 6a)

(a) Covers and Publisher's Blurbs

Camerarts thought highly enough of the language stolen from the plaintiff to feature it in the blurbs appearing on the cover of Merit Books or on the first page inside the front cover. Camerarts used Prather's materials in the blurbs for five infringing books.

Another measure of the importance of the material taken by the defendants is the language that the plaintiff's editors thought worthy of being placed on the cover or on the first page inside the front of its books. The record shows twelve such instances.

(b) Plagiarism of First Lines, First Pages, and Chapter Beginnings and Endings

In any work of fiction, especially one designed for mass market distribution as were the Merit Books, the most important lines in the book are the lines on the first page. Also important are the words and paragraphs at the beginnings and ends of the individual chapters in the books. An analysis on this basis shows that the plagiarized words not only played an important part in the defendants' books, but they were also important to the plaintiff's books.

First lines of the first chapters of three infringing books were derived from the plaintiff's works.

In six instances the defendants' books utilized the first pages of the first chapters of books written by the plaintiff.

In many of the defendants' books, the chapters were preceded by blurbs. In four instances these blurbs contained materials taken from the plaintiff.

3. The Quality of the Plaintiff's Material That Was Plagiarized

It is difficult for the defendants to argue that the plaintiff's writing was not good because they published so much of it and even repeated many of the same scenes in book after book. There are certain passages from the plaintiff's books that were repeated so often by the defendants that they must have great worth. For example, the following passage appears on pages 78-79 of the plaintiff's book entitled *Strip For Murder:*

> "She had raised up on one elbow to press her fingers against my mouth, and now she still held herself partly off the bed. Light from the front room, seeming brighter now, cast a silvery mistiness over her bare shoulders, and over proud breasts that looked smoother than ivory, soften than down.

> "She was looking at my face, her long-lashed eyes almost closed, lips parted. 'You won't be alone,' I said. I leaned closer to her and she tilted her head slightly, and I saw the tip of her tongue flick against her lips just before they parted even more. Then they were against my mouth. At first her lips were softer than the whispering wind outside the cabin, but then they writhed and curled against mine, and her tongue flicked against them again as we both moved closer together and our arms went around each other.
>
> "Her lips clung to mine for a long time, her hands against my back, fingers curling, then her lips went slack and her head rolled to one side. I kissed her throat, the curve of her shoulder, the soft warmness of her breasts, and she breathed rapidly, making small sounds deep in her throat. Then I felt her move against me, her lips traced my cheek and touched my ear as she whispered to me.
>
> "I got up. When I slid into bed beside her again, barely touching her, she was lying motionless on her back. For long seconds she lay that way, unmoving. Then slowly she turned toward me, pressed her lovely soft body deliberately against me."

This passage, more or less and word for word, was used by the defendants in *seven* infringing books.

In all, there are twelve instances of the multiple use in a number of Merit Books of the same, or parts of the same, passage from the plaintiff's books.

B. Defendants' Infringement Was Not De Minimus

On page 17 of their petition, defendants criticized the courts below, stating that they:

> "[F]ailed to make any analysis whatsoever of the alleged infringing language set forth in the Amended Complaint and the exhibits thereto."

The Appendix to the district court's opinion should put to rest any contention that it did not consider carefully

each instance where it found an infringment. In this Appendix, the court set forth specific pages of Merit Books on which infringing material appears opposite references to specific pages in plaintiff's books from which the material was taken. With a few exceptions, defendants have not undertaken to show this court, nor did they show the courts below, that the thirty-nine counts of the complaint listed on pages 4 and 5 of their petition are so insignificant that they should be treated as *de minimus.* As is pointed out above, some of the passages written by the plaintiff were so memorable that they appeared in seven separate Merit Books, and the texts of five Merit Books utilized Prather's materials in publisher's blurbs and on the covers.

The plaintiff will certainly admit that the plagiarism listed in some counts of the complaint is not as massive as that listed in others, but it was the defendants' job to point this out to the district court rather than merely to dismiss a count by saying that it was only two or three pages from the plaintiff's book.

C. Defendants' Unproven Innocence Is No Defense

In an obvious attempt to gain the sympathy of this court, the defendants have argued their innocence and good faith as mitigating factors on pages 3, 11, 14, 22 and 24 of their petition. To the extent that lack of intent can be a mitigating factor, the defendants have not proven it, and there are facts in the record which show that defendants Camerarts and Frank Sorren knew or should have known that Goff was copying from someone else's work.

All of the courts considering the so-called "innocent infringer" argument have held that a copyright infringer's lack of knowledge or good faith is immaterial to the infringer's liability. *See, e.g., Chappell & Co., Inc.* v. *Costa,* 45 F.Supp. 554 (S.D.N.Y. 1942). *See, Douglas* v. *Cunningham,* 294 U.S. 207 (1935) (upholding a district court judg-

ment of $5,000 and attorneys' fees against a defendant having no knowledge of the copyrighted materials); *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) (upholding the imposition of the maximum amount of discretionary damages, $5,000, against a defendant which unknowingly infringed); *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950) ("intention is immaterial if infringement appears." at 666); *Freudenthal* v. *Hebrew Pub. Co.*, 44 F.Supp. 754 (S.D.N.Y. 1942) (holding: "Even if defendants did not knowingly copy plaintiff's composition, that would be no defense." at 755).

V.

ATTORNEY'S FEES WERE PROPERLY AWARDED TO PLAINTIFF

Defendants contend that the district court should not have granted the minimal amount of $4,000 to the plaintiff for his attorney's fees. None of the cases cited by the defendants are factually comparable with the instant case. Additionally, in several of those cases the courts found that there was no infringement.

The trial court clearly had the discretion to award the plaintiff "a reasonable attorney's fee as part of the costs." 17 U.S.C. §116. The plaintiff was entitled to attorney's fees in this case because of the complex nature of the infringements and the great number of infringements. Although the attorneys for both plaintiff and defendants cooperated to make use of the district court's pre-trial procedures to simplify the issues and to reduce trial time, many hours were required to be spent. The plaintiff could have saved a great amount of attorney's fees if the defendants had stipulated to infringement, which was very clear. Additionally, the defendants introduced no evidence to support the positions that they had taken regarding certain contested issues of law and fact, including: (a) the

number of copies of each Merit Book title that were printed but not distributed and sold, (b) the direct expenses of the defendants attributable to those copies of each infringing Merit Book that were sold, with the exception of printing expenses, (c) the indirect expenses of the defendants attributable to those copies of each infringing Merit Book that were sold, (d) whether the plaintiff was estopped from claiming damages because of laches, and (e) that the defendants lacked knowledge of the infringements.

VI.

CONCLUSION

The only points raised in defendants' petition deal with instances where defendants (a) failed to meet their burden of proof and (b) disagree with the exercise of the district court's discretion. These do not present adequate reasons why the decisions of the courts below require the issuance of a Writ of Certiorari.

Wherefore, respondent prays that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: November 23, 1973

APPENDIX

APPENDIX

APPENDIX

Applicable Statutory Provisions

17 U.S.C. § 1(a) (1952):

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;

17 U.S.C. § 101 (1952):

> If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> • • •
>
> (b) *Damages and profits; amount; other remedies.*
>
> —To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.
>
> • • •

17 U.S.C. § 115(b) (1952); *as amended* (Supp. 1972):

> No civil action shall be maintained under the provisions of this title unless the same is commenced within three years after the claim accrued.

17 U.S.C. § 116 (1952):

> In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-614

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

vs.

RICHARD S. PRATHER,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief in opposition highlights what petitioners have said in their Petition for Certiorari. Contrary to Respondent's contentions, this case does not involve merely questions of proof, but involves important

issues of law. These issues of law have not been discussed adequately by either the District Court or Court of Appeals. The failure of the Courts below to address themselves to these issues is perhaps the strongest reason in favor of granting the Petition of Certiorari in this case. The issues presented in this cause cut across several important areas of copyright law in which there are no authoritative pronouncements, or in which there is conflict. This cause presents an admirable vehicle for this court to fill that void and to resolve conflicts.

In response to petitioners' clear demonstration that the trial court erroneously granted separate "in lieu" damages against both the distributor and publisher, respondent has cited absolutely no authority to uphold such an extraordinary ruling. There is, as stated by petitioners, absolutely no authority for such decision. To allow such obviously improper precedent to stand will create needless and untold confusion in the future development of the law of copyright and in the understanding of the current law.

In arguing that the Statute of Limitations did not bar this cause of action, the plaintiff demonstrates the grave inconsistency in the rulings of the courts below. Plaintiff simply cannot have it both ways. Either the distributor and the publisher are separate, and the Statute of Limitations has run as to the publisher, or they are one entity and plaintiff is entitled to only one award of damages against that entity. The only case which plaintiff cites in support of its position in regard to the Statute of Limitations is a District Court case which is clearly an aberration in the law. *Baxter* v. *Curtis Industries, Inc.*, 201 F. Supp. 100 (N.D. Ohio 1962). See cases cited

on pages 12-14, Petition for Certiorari. Allowing such aberration to stand, and giving it greater impetus by allowing the decisions below to stand, would again create unnecessary confusion.

Plaintiff's argument that the alleged copying in this cause was repeated and substantial does nothing to meet defendants' arguments regarding *de minimus*. Plaintiff continues his "shotgun" approach to this case in his brief in opposition. Each count is a separate and independent count which must either stand or fall by itself. Reference cannot be had to other counts to support each individual cause of action in regard to whether there was infringement. Plaintiff's response to defendants' clear demonstration that 39 of the counts state no cause of action is to cite other counts. That is tantamount to no answer at all. The copying in the 39 counts, which are *de minimus,* was not word for word nor substantial copying, and reference to other alleged copying will not make them so. As pointed out in defendants' Petition for Certiorari, much of the alleged "massive plagiarism" is contained within plaintiff's own mind. Plaintiff has recovered a windfall. As mandated within the statute itself, the "in lieu" damages "shall not be regarded as a penalty." The courts below have ignored this statutory direction, and have penalized these defendants for the actions of the author of the stories involved, who is not a party to these judgments. While innocence of an infringer will not insulate him from liability, the cases are legion that such innocence is to be taken into consideration in awarding damages. This, the courts below failed to do, compounding the damages awarded to plaintiff impermissibly.

In seeking to uphold the award of attorneys' fees, again, plaintiff has ignored all of the authority cited in the Petition for Certiorari which clearly states that attorneys fees should not be awarded in cases such as this. Contrary to the argument made in the Brief in Opposition, infringement was not clear in many of the counts of the complaint. Contrary to the statements made by plaintiff, defendants did introduce evidence that defendants lacked knowledge of the infringements, which evidence was not disputed, and that the plaintiff had been guilty of laches. The defenses raised by defendants were serious and are serious. To penalize a party for contesting a matter in good faith is directly contrary to both the statute and the decision of all of the lower courts. This is clearly not warranted.

In response to the great amount of authority cited by defendants herein, which shows without question that the courts below were guilty of a grave departure from the settled law of copyright, plaintiff has presented nothing. He has attempted to justify this decision on the grounds that defendants failed to meet their burden of proof, when the issue is not one of fact, but one of law. There is, in reality, no dispute as to the facts. The dispute is as to the legal conclusions to be drawn from these facts. Indeed, plaintiff has not seriously contested any of the facts as set forth by defendants. These facts and the unbroken authority cited by defendants show that the decisions of the courts below in this matter were obviously and demonstrably wrong. Allowing such opinions to stand will not only do a great injustice to these defendants, but will serve to inject an element of confusion into the law of copyright which will only serve to cause

injustice in the future. Not only have defendants shown that there is a conflict between the decision in this matter and the decisions in other circuits, but they have shown that there is a conflict between this matter and virtually every other case decided on the issues raised herein.

Wherefore, Petitioner prays that this Court's Writ of Certiorari issue, and that the judgment below be reversed.

Respectfully submitted,

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